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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

SEAN ROBERT BENGE,

Defendant and Appellant.

F057684

(Super. Ct. No. 1088436)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Scott T. Steffen, Judge.

Sharon G. Wrubel, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Daniel B. Bernstein and David A. Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

On Tuesday, January 4, 2005, appellant Sean Robert Benge ambushed Steven Brown and fatally shot him with a shotgun he purchased for a small sum from his uncle, Jerry Michael Benge.¹ At that time, Jerry was having an affair with Steven's wife, Katherine. Jerry did not like the way Steven treated Katherine. Sean told investigating officers that Jerry had complained to Sean about Steven and urged Sean to give Steven an "ass whupping." Jerry told Sean when Steven got off work and would be home alone. Sean entered the house through the unlocked back door and waited for Steven in the living room. Sean brought the loaded gun with him and held it while he waited for Steven's arrival. Sean stated that when Steven entered through the door and saw him, Steven unexpectedly wrestled with him. Sean said he got away from Steven and fired two shots at him, hitting Steven's shoulder and hand. Steven was still standing so Sean shot him a third time. This shot was fatal; the bullet hit Steven's neck and severed his carotid artery and jugular vein.

Sean and Jerry were both charged with murder. They were jointly tried before separate juries.

Sean was found guilty of first degree murder. The special circumstance of murder by means of lying in wait was found true, as was the special allegation that he personally discharged a firearm causing death. (Pen. Code, §§ 187, subd. (a); 190, subd. (a)(15); 12022.53, subd. (d).)² He was sentenced to life imprisonment without the possibility of parole plus a consecutive term of 25 years. In relevant part, a \$5,000 parole revocation fine was imposed.

¹ Solely to enhance readability, some of the people involved in this matter will be referred to by their first names. No disrespect is intended or implied by this informality.

² Unless otherwise specified all statutory references are to the Penal Code.

Jerry was found not guilty of murder but guilty of the lesser included offense of voluntary manslaughter. He was sentenced to 11 years' imprisonment.

Jerry and Sean separately appealed and raised different issues.

Sean challenges the sufficiency of the evidence supporting the lying-in-wait special circumstance. We are not persuaded. There is substantial evidence supporting the jury's determination that while Sean waited for Steven to come home, he possessed the specific intent to kill Steven.

Sean also argues the parole revocation fine is unauthorized. Respondent concedes the sentencing error and we accept the concession as properly made.

We will strike the parole revocation fine and, as modified, affirm the judgment.

FACTS

I. Background leading up to the homicide

Steven Brown lived with his wife, Katherine, and their children in Ceres. There was a gate across the driveway to their house that was always locked. The front door was also kept locked. Family members normally entered and exited through a sliding glass door at the back of the house which was left unlocked during the day.

Jerry was married to Steven's cousin, Sandra. Sean lived with Jerry and his family. Sean was a regular methamphetamine user and was frequently unemployed.

The two families socialized and participated in 4-H activities together. Jerry kept some animals at the Browns' house.

In 2004, Jerry and Katherine began having a clandestine sexual relationship that continued until Jerry was arrested for his role in Steven's murder. Katherine and Jerry never discussed leaving their respective spouses and marrying each other. Katherine testified that Steven was controlling and argumentative but was not physically abusive. She had no intention of divorcing him.

Soon after Thanksgiving 2004, Jerry sold Sean a Remington 12-gauge single-barrel shotgun for \$50. The shotgun held three rounds. The barrel of the shotgun was intact when he sold it to Sean.

Sometime in December 2004, Jerry and Katherine went Christmas shopping with their children. Steven called Katherine and asked why they were not home. Katherine quickly paid for her purchases and went home.

Jerry was upset by this interruption. He went home and began drinking. Jerry complained to Sean that Steven was a hindrance to his relationship with Katherine. Sean suggested that Jerry do something about it. Jerry replied that he would like to but could not because of his poor physical condition. Jerry asked Sean, "Why don't you go do something about it." He told Sean to go to Steven's house and "whup his ass."

A few weeks before the homicide, Sean showed his brother a shotgun and asked if he knew where he could go for target practice. The barrel of the shotgun had not been modified.

On Christmas Eve, Sean went to the Browns' house. He unsuccessfully attempted to sell Steven a gun.

On or about December 30, 2004, a distinctive red and black racing motorcycle without license plates was stolen from a towing yard in Ceres.

On January 2, 2005,³ Sean arrived at Glynn Duncan's house on a red Suzuki motorcycle. Sean said that he got it at a junkyard. Duncan offered to buy it. Sean told him that he wanted to keep it for a few days because his uncle wanted him to get rid of some stuff.

On that same day, Sean called Jerry. Sean said he was going to go to Steven's house on Wednesday. Jerry said, "Why don't you go Tuesday. I'll be at the doctors."

³ Henceforth, unless otherwise specified all dates refer to 2005.

Jerry did not tell Sean what kind of injury to inflict on Steven. He did not tell Sean to take “any kind of a weapon” with him. At an unspecified point in time, Jerry told Sean that Steven got home from work around 2:30 in the afternoon. Sean knew that the children got home later in the day.

II. The homicide and events shortly afterward

Jose Olibera was a neighbor of the Browns. Around 2:00 or 2:30 p.m., he saw a motorcycle drive up the driveway near the Browns’ house. The driver was tall and weighed between 230 to 260 pounds. He heard three metallic sounds from the vicinity of the house. The first two sounds occurred in immediate succession; the third sound occurred after a gap of one to four seconds. Then he saw the person drive away on the motorcycle.

Another neighbor, Jack Brady, saw Steven walking toward his house around 2:30 p.m. They waved to each other. Two to five minutes later, he heard a metallic sound. He heard the same noise again about two or three minutes later. Shortly afterward, a man who appeared to be a little bit smaller than Steven⁴ drove away on a red motorcycle.

Steven’s children arrived home from school about 2:45. One of them found Steven lying on the floor near the sliding glass door; he was dead.

The first police officer arrived at the scene about 3:05 p.m. Steven suffered three gunshot wounds. One shot hit Steven’s wrist, and another hit his right shoulder. The third shot hit Steven’s face and neck, severing his carotid artery and jugular vein.

All of the shots were fired at close range. A shotgun cap was found in Steven’s right jaw, indicating the gun was fired at a very close range. The gun was probably fired a few feet away or less from the wound to the face. The gun was probably a little closer

⁴ Steven was 6’1” tall and about 350 pounds. Sean was 6’3” tall and weighed approximately 280 pounds.

when the shoulder wound was inflicted. The hand wound could have been a contact wound.

Three shotgun casing were found by Steven's body. Shotgun wadding was found near the sliding glass door.

Blood spatter was found on the wall above Steven's head, on the ceiling and on the sliding glass door. A speck of blood was found on the inside of the front door.

Nine guns were found at Steven's house.

Late in the afternoon of January 4, Sean arrived at Russell Mize's home on the motorcycle. He said that he wanted to sell and get rid of it. Duncan was at the house and purchased it for \$100. Duncan put it in his pickup truck and took it to John Soper's house. While the motorcycle was being unloaded, Soper found a carry bag that had been slipped between the toolbox and the side of the truck bed. It contained a shotgun. Soper kept the gun.

Jerry testified that after Steven's murder he loaned Sean \$300.

On January 5, Katherine noticed that the heavy wood stove in the living room had been pushed two or three inches off its foundation and the pipe that connected the stove to the wall had pulled away from the wall. Ed Campbell, who was a detective with the Stanislaus County Sheriff's Department, thought this indicated there might have been a fight in the house.

Katherine wore a surveillance wire during conversations with Jerry on February 10 and 17. In both conversations Jerry said that neither he nor Sean killed Steven. In the first conversation Jerry reassured Katherine that she and her children were safe because he killed the two guys who were involved in Steven's death. In the second conversation, he denied setting up Steven's murder.

Jerry was arrested on February 22, following an interview with the police. In this interview Jerry admitted that he asked Sean to go to Steven's house and "whoop his ass."⁵ At trial, Sean played excerpts from Jerry's police interview as defense evidence. During one of these excerpts Campbell told Jerry that the stove was moved. Jerry replied, "Well, see, that is what I was wondering. That fucking stove is heavy." Campbell said, "There was a fight." Jerry said that he did not "know any particulars about that." Campbell reiterated that there was a fight. Jerry responded, "Well, there was supposed to be."

On March 3, Soper gave the motorcycle frame to the police and took them to a canal. Officers recovered a shotgun that was later identified as the murder weapon from the canal. The shotgun's barrel had been sawed off.

In May, Jerry forged a letter to the district attorney bearing Sean's signature. The letter stated Jerry did not send him to Steven's house or ask him to hurt or shoot anyone; he was at Steven's house stealing stuff and got caught. In June, Jerry wrote letters to Sean asking him to relate the theft scenario to the district attorney and Sean's lawyer.

Jerry's wife, Sandra, testified that the term "whip ass" was a common term that was used frequently by her father, Jerry and other members of their family. Growing up, an "ass whipping" meant being spanked with a belt. Jerry would sometimes say that someone needed an "ass whooping" and this meant being "smacked or shaken" so they would "think about what you're doing." It did not involve anything beyond a bloody nose or black eye.

III. Sean's confession

On February 23, Sean was in jail on an unrelated matter. He was interviewed by Detective Campbell and Kirk Bunch, an investigator for the district attorney's office. Sean was *Mirandized*. (*Miranda v. Arizona* (1966) 384 U.S. 436). He waived his rights and

⁵ Capitalization not followed throughout opinion.

consented to the interview. It lasted approximately two hours and 40 minutes, was recorded on a DVD and transcribed. This interview was played for both juries.

At the outset of the interview, Sean admitted that he had a red and black motorcycle for a few days and did not know where he got it. He sold it for \$100. He also acknowledged purchasing a shotgun from Jerry but said he sold it before Steven's death. Eventually, Sean confessed to shooting Steven.

Sean said that Jerry complained about the way Steven treated Katherine. Jerry told him "to go over there and teach [Steven] a lesson." Jerry told him "get it done." Jerry said Steven would be home from work around 2:30 p.m. Sean thought he personally chose the day of the homicide.

Sean rode the motorcycle to Steven's house. He brought the shotgun with him inside a bag. He denied shortening the barrel on the gun. He entered the house through the unlocked sliding glass door and waited in the living room for Steven to come home. Sean said that he had the shotgun in his hand while he was waiting.

When Steven walked through the sliding door, Sean tried to "shoulder tackle" him. They hit up against the wall. Sean and Steven wrestled in a manner Sean described as "bear hugging." Sean got away from Steven. At this point, Sean said he "panicked." Sean fired a shot at Steven. He backed away, pointed the gun at Steven and fired a second shot at him. Steven was still standing and Sean did not know if he had been hit by the gunshots. Sean was scared so he shot Steven a third time. Steven was standing by the wall when Sean fired the third shot. Campbell said, "Once he's shot, I mean, he knows you." Sean replied, "That's why I panicked." Sean said he "didn't want to kill anybody" but he "just got scared, he, he might do that to me, you know, if he got the upper hand on me."

Sean left the house through the front door. He drove to Duncan's house and left the shotgun in Duncan's truck. Four or five days later, Jerry gave him about \$500 and told him that he might have to get out of town. Sean bought drugs with the money.

Jerry testified in his own defense. He admitted telling Sean to give Steven an “ass whupping.” He meant for Sean to fight with Steven and maybe give him a black eye or a bloody nose. Jerry thought Steven would be smart enough to wear a mask and take a few friends with him so that Steven would not have been able to identify Sean. Jerry never told Sean to kill Steven.

DISCUSSION

I. The lying-in-wait finding is supported by substantial evidence.

Sean contends the lying-in-wait special circumstance must be reversed because the People failed to prove that he intended to kill Steven while he was waiting for Steven to arrive home. He argues there was no evidence countering the statements of Jerry and Sean that Sean was supposed to give Steven an “ass whupping.” Sean contends that he only took the shotgun to the house to protect himself from Steven, a large man who possessed numerous guns. He points out there was evidence of a struggle near the wooden stove in the living room and argues this is inconsistent with a preexisting plan to kill.

We are not convinced. As will be explained, the record contains substantial evidence from which a jury could conclude beyond reasonable doubt that Sean possessed the specific intent to kill Steven while he was waiting for Steven to arrive home.

When reviewing a challenge to the sufficiency of the evidence, we assess the entire record in the light most favorable to the judgment below to determine whether it contains substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) “The standard is the same, regardless of whether the prosecution relies mainly on direct or circumstantial evidence. [Citation.]” (*People v. Vazquez* (2009) 178 Cal.App.4th 347, 352 (*Vasquez*).)

In applying the substantial evidence standard of review, the appellate court adopts all reasonable inferences and presumes in support of the judgment the existence of every

fact that a jury reasonably could have deduced from the evidence. The testimony of a single witness is sufficient to prove a disputed fact unless the testimony is inherently improbable or physically impossible. (*People v. Young* (2005) 34 Cal.4th 1149, 1181; *People v. Scott* (1978) 21 Cal.3d 284, 296.) The trier of fact makes credibility determinations and resolves factual disputes. (*People v. Estrella* (1995) 31 Cal.App.4th 716, 724-725.) An appellate court will not substitute its evaluation of a witness's credibility for that of the fact finder. (*Vazquez, supra*, 178 Cal.App.4th at p. 352.) ““Few criminals would ever be convicted if their explanations were accepted as gospel truth.”” (*People v. Carlson* (1960) 177 Cal.App.2d 201, 204.)

The appellate court will not reverse a jury's verdict solely because it would have reached a different result if it had been the fact finder. (*Vasquez, supra*, 178 Cal.App.4th at p. 352.) ““Before a judgment of conviction can be set aside for insufficiency of the evidence to support the trier of fact's verdict, it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support it.” [Citation.]” (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1245; see also *People v. Kraft* (2000) 23 Cal.4th 987, 1053-1054.)

The special circumstance of lying in wait requires ““an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage” [Citations.]” (*People v. Carpenter* (1997) 15 Cal.4th 312, 388.) The lying-in-wait special circumstance also requires proof that the defendant possessed the intent to kill while he or she was waiting for the victim. (*People v. Moon* (2005) 37 Cal.4th 1, 24, fn. 1; *People v. Poindexter* (2006) 144 Cal.App.4th 572, 579-580, fn. 10.) “[L]ying in wait as a theory of murder is ‘the functional equivalent of proof of premeditation, deliberation and intent to kill’ [citations]; hence, ‘a showing of lying in wait obviates the necessity of

separately proving premeditation and deliberation' [Citation.]" (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1149, fn. 10.)

The record contains substantial evidence proving Sean planned to kill Steven, not to beat him up. The murder occurred during the brief window of time when Sean knew Steven would be alone in the house. Sean either stole a motorcycle or he received it after it was stolen. A jury reasonably could conclude that at some point in time prior to the murder Sean sawed-off the barrel of the shotgun, which would make it easier to transport. Sean loaded the shotgun and placed it in a carry bag. He drove to Steven's house and parked the motorcycle in a concealed location. He entered the house through the unlocked sliding glass door. He took the loaded shotgun out of the carry bag and held it while he was waiting for Steven to come through the door.

Despite all this preparation and planning, Sean did nothing to prevent Steven from identifying him. He did not bring a mask or attempt to disguise himself. Steven and Sean knew each other; their families socialized together. Without a mask or disguise, Sean could not have beaten up Steven without Steven identifying him. A jury reasonably could have concluded that if Sean had intended to deliver an anonymous beating to teach Steven a lesson, he would have brought a mask or some sort of disguise to conceal his identity and prevent retaliation. The absence of a mask or disguise and the presence of a loaded shotgun during the period Sean waited for Steven is strong evidence that Sean planned to kill Steven, not beat him up.

If Sean intended to deliver an "ass whupping" by fighting with Steven, he would not have panicked when Steven wrestled with him. Jerry and Sandra testified that an "ass whipping" involved a fight or light beating. Instead of fighting with Steven, once he got free from Steven's grip he immediately fired two shots at him. Sean admitted pointing the gun at Steven when he fired these shots. When Steven did not fall to the ground, Sean was unsure if he had been hit. So Sean fired a third shot directly at Steven's head, hitting his

neck and lower face. The number and location of the gunshots are further evidence that Sean planned to kill Steve. Neighbors confirmed Sean's confession on this point. They testified hearing there was a space of a few seconds between the metallic sounds they heard soon after Steven arrived home. Sean did not drive away until Steven was lying on the floor, dying. In his confession Sean said he exited through the front door to avoid coming into contact with Steven's body.

Sean makes much of the fact that he and Steven wrestled prior to the shooting and the stove was moved. This evidence does not preclude a finding that Sean harbored a preexisting intent to kill Steven. Victims often resist their assailants. Steven walked through his back door and saw Sean standing inside the house with a shotgun in his hand. Sean said he tried to slide-tackle Steven and the two men wrestled. It is possible that the stove was moved during the struggle. When Sean got away from Steven he shot at him twice at close range -- he did not try to fight with him.

The wound to Steven's hand might have been a contact wound. Steven might have been attempting to wrestle the gun out of Sean's hand when Sean fired this shot. Steven might have initiated the struggle with Sean in a futile attempt to prevent Sean from shooting him. The physical evidence is not inconsistent with such a conclusion. The jury was not required to believe everything Sean said in his confession.

In sum, a jury could reasonably conclude from the entirety of the evidence that during the time Sean waited in the house for Steven to arrive home, he possessed the specific intent to kill Steven. Therefore, we reject Sean's challenge to the sufficiency of the evidence supporting the lying-in-wait special circumstance. The guilty verdicts did not infringe Sean's state and federal rights to due process of law.

II. The parole revocation fine is unauthorized.

In relevant part, the trial court imposed a \$5,000 parole revocation fine. Sean asserts that this fine is unauthorized and must be stricken because his sentence did not

include a period of parole. Respondent concedes this sentencing error and we accept the concession as properly made.

Sean was sentenced to life imprisonment without the possibility of parole plus a consecutive term of 25 years. “[A] parole revocation fine is inapplicable where there is no possibility of parole.” (*People v. DeFrance* (2008) 167 Cal.App.4th 486, 505; *People v. Jenkins* (2006) 140 Cal.App.4th 805, 819; *People v. Oganessian* (1999) 70 Cal.App.4th 1178, 1183.)

The appropriate remedy is to strike the unauthorized fine. (See, e.g., *People v. DeFrance*, *supra*, 167 Cal.App.4th at p. 506.) An unauthorized sentence can be corrected at any time. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1044-1045.) Since correction of the sentence does not involve any exercise of judicial discretion, remand to the trial court is not necessary.

DISPOSITION

The sentence is modified to strike the parole revocation fine. As modified, the judgment is affirmed.

Levy, Acting P.J.

WE CONCUR:

Poochigian, J.

Detjen, J.